IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.K.DENESAN

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

WP(C).No. 28804 of 2006(D)

PETITIONER:

VALSALAKUMARI K.J.,
DEPUTY COMMISSIONER, COMMERCIAL TAXES,
KOZHIKODE.

BY ADV. SMT.V.P.SEEMANDINI (SR.)
SRI. M.S.UNNIKRISHNAN
SRI.M.R.ANISON
SRI.P.R.RAJESH
SMT. K.P.GEETHAMANI
SMT.S.KARTHIKA
SMT.R.B.RAMANI

RESPONDENTS:

1. **STATE OF KERALA, REP. BY**
   SECRETARY (TAXES), GOVERNMENT OF KERALA,
   TRIVANDRUM.

2. **THE COMMISSIONER OF COMMERCIAL TAXES,**
   TRIVANDRUM.

3. **K.M.ALTHAF,**
   DEPUTY COMMISSIONER (AUDIT ASSESSMENT),
   TRIVANDRUM, PUBLIC OFFICE BUILDING,
   MUSEUM P.O., TRIVANDRUM.

BY GOVERNMENT PLEADER SRI.P.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/03/2007, THE COURT ON 13/04/2007 DELIVERED THE FOLLOWING:

WPC.NO.28804/2006D

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:	**COPY OF THE ASSESSMENT NOTICE NO.33021411/99-00 DTD. 11/11/2005.**
EXT.P2:	**COPY OF THE NOTICE DTD. 01/12/2005.**
EXT.P3:	**COPY OF THE REPLY DTD. 11/07/2006.**
EXT.P4:	**COPY OF THE ASSESSMENT ORDER DTD. 17/07/2006.**
EXT.P5:	**COPY OF THE SUSPENSION ORDER DTD. 30/10/2006.**
EXT.P6:	**COPY OF THE SUSPENSION ORDER DTD. 30/10/2006 TO MR. PRATHAPAN.**
EXT.P7:	**COPY OF THE COMMUNICATION DTD. 26/11/2005 BY THE 2ND RESPONDENT TO THE 3RD RESPONDENT.**
EXT.P8:	**COPY OF THE COMMUNICATION DTD. 17/01/2006 BY THE PETITIONER TO THE 1ST RESPONDENT.**
EXT.P9:	**COPY OF THE COMMUNICATION DTD. 2/05/2006 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.**
EXT.P10:	**COPY OF THE SUSPENSION ORDER DTD. 2/11/2006 ISSUED BY THE 1ST RESPONDENT.**
EXT.P11:	**COPY OF THE REPRESENTATION DTD. 5/12/2006.**
EXT.P12:	**COPY OF THE G.O.(MS) NO.56/05/TD DTD. 31/03/2005.**
EXT.P13:	**COPY OF THE PAPER REPORT DTD. 17/11/2006 PUBLISHED IN THE HINDU DAILY.**

/TRUE COPY/

KSS

K.K. DENESAN, J.

= = = = = = = = = = = = = = =

W.P.(C) No.28804 OF 2006 D

= = = = = = = = = = = = = = =

Dated this the 13th April, 2007

J U D G M E N T

Challenge is to Ext. P10 order issued by the 1st respondent placing the petitioner and one Shri. P. Prathapan, Asst. Commissioner, Commercial Taxes, under suspension. The petitioner belongs to the cadre of Deputy Commissioner, Commercial Taxes. As per orders issued by the 1st respondent, the Deputy Commissioners are entrusted with the duty to scrutinise the assessment orders issued by the Assistant Commissioners before approving the same.

2. It is alleged that the petitioner and Shri. Prathapan committed grave derelictions of duty in as much as they miserably failed to safeguard the legitimate revenue to the State running to lakhs of rupees in collusion with the assessee who is a dealer in motor cars thereby helping the assessee to evade sales tax. On the same set of allegations the petitioner was suspended from service as per Ext. P5 order dated 30-10-2006 passed by the 2nd respondent.

The petitioner challenged that order in this writ petition. This Court as per interim order dated 2-11-2006 expressed the view that the 2nd respondent was not competent to place the petitioner under suspension and directed that the petitioner shall be deemed to continue in service. Subsequently, the 1st respondent which is admittedly the competent authority to place the petitioner under suspension, has passed Ext. P10 order. Challenge against Ext. P5 has become infructuous, automatically.

3. Ext. P10 is attacked on the ground of malafides, non-application of mind, and violation of the fundamental rights guaranteed under Articles 14, 16 and 21 of the Constitution.

4. Facts leading to the issuance of Ext. P10 may first be noticed. M/s. KTC Automobiles (hereinafter referred to as the 'dealer') is an assessee on the rolls of the Assistant Commissioner, Special Circle II, Kozhikode. The petitioner is the District Deputy Commissioner and immediate superior officer of the Asst. Commissioner, Special Circle II, Kozhikode. M/s.

KTC Automobiles is engaged in the purchase and sale of Hyundai cars having its head office in Kozhikode. During 1999-2000 the rate of tax as far as the sales of motor vehicles in Kerala was 12% plus A.S.T. whereas the rate of tax in Mahe, a Union Territory of Pondichery, having 5 Sq.Kms. extent surrounded by Kerala, was only 6%. M/s. KTC Automobiles opened a branch at Mahe for the sale of cars. According to the respondents it was done with the ulterior motive of showing the sales of cars made in Kerala as those in Mahe and thereby to evade sales-tax. The investigation wing of the Commercial Taxes Department conducted a detailed enquiry into the matter and found that M/s. KTC Automobiles, during 1999-2000 had clandestinely made records to show that 263 Hyundai cars which were actually sold in Kozhikode from their head office, were sold in their branch at Mahe. The sales turn over of 263 cars was Rs.8,15,64,213/-. According to the Intelligence Wing it was revealed that no transit passes had been surrendered except for 7 cars covered by transit pass No. 484 dated 26-8-1999 at Sates Tax

Check Post, Kunhipally.

5. The Intelligence Officer issued notice to the dealer on 7-6-2000 under Section 45A of the KGST Act proposing imposition of penalty in respect of the sale of 263 cars. Being not satisfied with the reply given by the dealer, a second notice was issued affording opportunity to submit one more representation. As per order dated 30-3-2001 the Intelligence Officer imposed penalty on the dealer under Section 45A of the KGST Act. But the petitioner set aside the order of penalty as per the order passed on 8-1-2002 in STRP.No.73/2001. This action of the petitioner laid the foundation for taking suo motu proceedings by the Commissioner of Commercial Taxes against the dealer under Section 37 of the KGST Act. The Commissioner issued notice to the dealer on 16-2-2002. The proceedings were completed by the Commissioner by issuing order dated 12-8-2002 setting aside the order of the petitioner in STRP.No.73/2001 dated 8-1-2002 and restoring the order of the Intelligence Officer imposing penalty on the dealer. Feeling aggrieved, the dealer filed

MFA.No.1000/2002 before this Court seeking to set aside the order of the Commissioner. The above Miscellaneous Appeal was admitted on the file of this Court and all further proceedings pursuant to Order No.K2/544/2002/CT dated 12-8-2002 of the Commissioner of Commercial Taxes were stayed. The order of stay was in force until MFA.No.1000/2002 was finally disposed of as per judgment dated 20-3-2006. As per the above judgment, this Court found that the order passed by the Intelligence Officer restored by the order of the Commissioner of Commercial Taxes was liable to be set aside. Though the appeal was allowed as above, this Court made it clear that the observations and findings made in that judgment shall in no way affect the assessment proceedings and that such proceedings shall be concluded based on materials available on record untrammeled by the observations therein.

6. Pending finalisation of the proceedings under Section 45A of K.G.S.T. Act, and thereafter, during the pendency of MFA.No.1000/2002 before this Court, the assessing authority did not take action under Section

17 of the KGST Act for completing the assessment for the year 1999-2000. The petitioner sought for extension of time on 16-5-2005 as provided in Section 17(7) of the KGST Act for completing the due assessment. On 11-11-2005 the assessing authority, namely, the Assistant Commissioner issued Ext.P1 Pre-assessment notice to the dealer under Section 17(3) of the Act proposing an addition of Rs.7,95,26,893.00 in respect of 256 cars for the year 1999-2000. It is evident from a reading of Ext. P1 that the above pre-assessment notice was issued based on certain materials in support of the amount of tax demanded. Relevant portion from Ext. P1 is extracted below:

> **"The return filed and the accounts produced are however found to be not acceptable as correct and complete for the purpose of assessment for the following reasons.**
>
> **1. M/s.KTC automobiles, YMCA road, Kozhikode who is a registered dealer of 2nd circle, Kozhikode bearing RC.No.33122850 has shown as sold 263 Nos. of Hyundai cars during the year 99-2000 for Rs.8,15,64,213.00 through their Mahe branch in Pondicherry. The Investigation branch attached to the O/o.the Deputy commissioner (Intelligence) Commercial taxes, Kozhikode has conducted an investigation in this regard which revealed**

that no transit passes have been surrendered except for 7 cars covered by transit pass No.484 dated 26-8-99 at Sales Tax Check Post, Kunhipally.

The investigation branch therefore made detailed enquiries regarding the above. Several pieces of evidences were considered and they came to a finding that 256 Nos. of Hyundai cars have been effected through the branch office at Mahe and evaded payment of tax legitimately due to the govt. of Kerala. Penalty notice was issued to the assessee by the Intelligence Officer (IB). Again detailed verification of the evidences available with the department and that produced by the assessee were verified. The contentions raised at the time of hearing also was considered by the Intelligence Officer.

The Intelligence Officer came to a conclusion that none of the objections were sustainable and the cars stated to have been sold at Mahe have been really sold at Calicut and thus the dealer had evaded payment of tax. The Intelligence Officer therefore found that there is clear mensrea and there had been a sales suppression of Rs.7,95,26,893.00 which attract penal action under section 45A of the Act. The Intelligence Officer therefore imposed a penalty of Rs.86 Lakhs on the assessee as per his order No.IB 162/2000/B dated 30-3-01.

The assessee filed revision before the Deputy Commissioner which was allowed. But in second revision, the Commissioner of Commercial Taxes set aside the Intelligence Officer (IB). The defects noticed by the Intelligence Officer (IB) is found to exist on my verification also.

2. The form 'F' furnished by KTC automobiles Mahe is not acceptable as there is no actual movement of vehicle to Mahe. As per the decision of the Hon'ble High Court of Kerala in (2004) 12, KTR 34 there must be proof of transport of goods across the border. Mere production of statutory forms does not prove stock transfer.

3. There is income from warranty amounting to Rs.20,220.96 which is liable to be assessed in your hands.

It is therefore proposed to reject the return filed and the accounts produced and to estimate the turnover to the best of judgment as detailed under:

Total turnover as per accounts	: Rs.13,81,66,948.26
Add: 1. Sales suppression detected as in defect No.1	: Rs. 7,95,26,893.00
2. Income from warranty	: Rs. 20,220.96
Total turnover proposed	: Rs.21,77,14,061.26
Less exemption allowed:	
1. On 2nd sales : Rs. 2322712.13	
2. ST collected : Rs.12826471.82	
	: Rs. 1,51,49,183.95
Balance taxable turnover proposed	: Rs.20,25,64,877.31
Or	: Rs.20,25,64,880.00

This is proposed to be taxed as under:

Taxable @ 10%	Rs.14,75,59,810.00
Taxable @ 6%	Rs. 16,62,050.00
Taxable @ 12%	Rs. 5,29,12,360.00
Taxable @ 8%	Rs. 4,30,660.00
	Rs.20,25,64,880.00 "

7. For expediting the assessment proceedings, the Commissioner wrote letter dated 26-11-2005 to the petitioner. By the above notice the dealer was called upon to appear before the Asst. Commissioner for being heard against the above proposal within seven days on receipt of that notice. The dealer submitted Ext.P2 reply in response to Ext.P1 notice. In Ext.P2, reference was made to the filing of MFA.No.1000/2002 as also the interim order passed by this Court on 17-1-2003 staying the operation of the order under Sec.45A of the Act. In Ext.P2 contentions were taken on behalf of the dealer that since further proceedings pursuant to the order of the Commissioner of Commercial Taxes stood stayed by the order of this Court in M.F.A. No. 1000/2002, the penalty proceedings under which the suppression of turn over was fixed at Rs.7,95,26,893/- was also inoperative and the same ought not to have been relied on for making the assessment. According to the dealer, the proposal to complete the assessment by placing reliance on the order which was legally unenforceable in the light of the order of stay passed

by this Court was not only improper and irregular but illegal also. It was contended further that the proposed assessment proceedings would amount to contempt of court. By the time Ext.P2 letter issued on behalf of the dealer had reached the office of the assessing authority, the petitioner received a letter written by the Commissioner on 7-12-2005. In the said letter, the Commissioner insisted that the assessment proceedings shall be completed taking into account the materials referred to in the penalty proceedings. On 17-1-2006 the dealer submitted a representation before the Asst. Commissioner in reply to the pre-assessment notice raising contentions in support of its request that the assessment ought not to be finalised utilising the materials relied on by the Intelligence Officer in the penalty proceedings. After receiving Ext.P3 reply from the dealer, neither the Asst. Commissioner nor the petitioner did take any steps to proceed further with the proposed assessment. While so, MFA.No.1000/2002 was heard and disposed of by a Division Bench of this Court as per judgment dated 20-3-2006. Four months

thereafter, the Asst. Commissioner issued order dated 17-7-2006 deleting the proposed addition of Rs.7,95,26,893/- and finalising the assessment for the year 1999-2000. Ext.P4 shows that the Asst. Commissioner has taken notice of the various contentions urged by the dealer opposing the proposal made in the pre-assessment notice and has found merit in those contentions based on the reasons, observations and findings contained in the judgment of the Division Bench in MFA.No.1000/2002. One finds verbatim reproduction of the reasons given by the Division Bench in the above mentioned judgment. In page No.13 of Ext.P4 the assessing authority says, "I have carefully considered the contentions raised by the assessee. The Hon'ble High Court of Kerala has allowed the MFA filed by M/s.KTC Automobiles observing as under." Thereafter certain portions from the judgment in MFA are extracted in Ext.P4. The last portion thus extracted by the Asst. Commissioner in Ext.P4 reads:

> **"In the above view of the matter and taking into consideration of the totality of the circumstances, we find that the order passed by the Intelligence Officer and**

> **restored by the order of the Commissioner of Commercial Taxes are liable to be set aside and we do so."**

Thereafter Ext. P4 proceeds as under:

> **"Thus the Hon'ble High Court of Kerala has set aside the order imposing penalty on the assessee. The assessee has also produced copy of the assessment order of the Commercial Tax Officer Mahe dated 3-10-01 in which the above stock transfer are verified and treated as sales made at Mahe and assessed accordingly. This is a material evidence showing sufferance of tax at Mahe. The decision brought to my notice and the connected tacts such as the place of registration of the vehicles etc also goes in favour of the assessee. Hence the addition proposed at Rs.7,95,26,893/- is deleted."**

8. The petitioner approved Ext.P4 with the result that the additional amount of sales tax due from the dealer as per the notice of demand for the assessment year 1999-2000 was Rs.1,555/-.

9. The 2nd respondent Commissioner felt that the conduct of the Asst. Commissioner and that of the petitioner in delaying the finalisation of the assessment proceedings and accepting the case put forward by the dealer was improper and against public interest. Exts. P5 and P6 were passed in contemplation

of disciplinary action against the above two officers. As already stated, this Court while admitting this writ petition, expressed the prima facie view that Ext.P5 may not stand legal scrutiny for want of jurisdiction and directed that the petitioner shall be deemed to be in service. Thereafter Government issued Ext. P10 on 2-11-2006.

10. The question for consideration is whether Ext. P10 is liable to be set aside.

11. Ext. P10 has been issued in exercise of the power under Rule 10 of the Kerala Civil Services (Classification, Control and Appeal) Rules (hereinafter referred to for short as the Rules). Relevant portion from the above rule is extracted below:

> **"10. Suspension:- (1) The appointing authority or any authority to which it is subordinate or any other authority empowered by the Government in that behalf may at any time place a Government servant under suspension,**
>
> **a) where a disciplinary proceeding against him is contemplated or is pending; or**
>
> **b) where a case against him in respect of any criminal offence is under investigation or trial; or**

c) where final orders are pending in the disciplinary proceeding,

if the appropriate authority considers that in the then prevailing circumstances it is necessary, in public interest that the Government servant should be suspended from service.

Provided that the authority competent to place a member of the Kerala Civil Judicial Service or the Kerala Criminal Judicial Service under suspension shall be the High Court of Judicature.

.....

(6) An order of suspension made or deemed to have been made under this rule may at any time be revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate.

.....”

Rule 10 aforesaid clothes the Government with considerable amount of power to place Government servants under suspension at any time where a disciplinary proceeding is contemplated or pending, or, where a case against him in respect of any criminal offence is under investigation or trial, or, where final orders are pending in the disciplinary

proceeding. Such an order placing a Government servant under suspension can be issued if the competent authority considers that in the then prevailing circumstances it is necessary in public interest that the Government servant should be suspended from service. Suspension order can be issued when the disciplinary proceedings are contemplated or have started or when the charge-sheet is given.

12. Whether the Government servant against whom disciplinary proceedings are contemplated should or should not continue in his/her office during the period of inquiry is a matter to be assessed by the authority concerned and ordinarily the court should not interfere with the orders of suspension unless they are malafide and without there being even prima facie material connecting the Government servant with the alleged misconduct. In *State of Orissa v. Bimal Kumar Mohanty* {(1994) 4 SCC 126} the Apex Court held that it shall not be an administrative routine or an automatic order to suspend the Government servant. The gravity of the alleged misconduct or the nature of the allegations

imputed to the delinquent employee are relevant considerations. A Government servant can be placed under suspension for the smooth conduct of disciplinary proceedings. It is not necessary that before suspending the employee he shall be found guilty. In *Muhammed v. State of Kerala* (1997 (2) KLT 394) this Court has held that " when the allegations are of a serious nature, which have got considerable public interest, and those allegations are based on some relevant material, authority can always place the Government servant under suspension, even till the completion of the disciplinary proceeding, investigation or trial. It depends upon the gravity of the offences, nature of the allegations as well as public interest involved. Such action of the Government would be justified so as to achieve the purity of administration." An order of suspension can be passed only after due application of mind. In *Raj Mohan v. Secretary to Government* (2001 (3) KLT 956) this Court (Kurian Joseph, J.) held that the paramount consideration in placing a public servant under

suspension is public interest. In *Anilkumar v. State of Kerala* (2002) (2) KLT 101) Balakrishnan Nair, J. expressed the view that an order of suspension can be successfully challenged under Article 226 of the Constitution of India if only the same has been issued without jurisdiction. The learned Judge further held that "assuming everything that is stated in the suspension order is correct, still the suspension is unwarranted, this Court can interfere with it." A suspension order cannot be attacked in writ jurisdiction on the ground that the facts stated therein are not correct or the conclusions on the facts are improper. In *Government of Tamil Nadu v. K.N. Ramamurthy* {(1997) 7 SCC 101}the Apex Court made the following observations in paragraph 7 of the judgment:

> **" In the case on hand, the finding accepted by the disciplinary authority was to the effect that by the act of negligence in making the assessment, the delinquent caused loss to the government exchequer to the extent of Rs.44,850. This finding of the disciplinary authority is not open to challenge on the facts of the case. This Court in Upendra Singh case {(1994) 3 SCC 357} has ruled that the Tribunal has no jurisdiction to go into the correctness or truth of the charges and the Tribunal cannot**

> **take over the functions of the disciplinary authority. This Court, in the said case, further observed that the function of the Court/Tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court. This Court further held that in case of charges framed in a disciplinary enquiry, the tribunal or the court can interfere only if on the charges (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law."**

A Division Bench of this Court in *Mathew v. State of Kerala* {2000(1) KLT 245} emphasized that there should be due application of mind before passing an order of suspension.

13. The first ground on which Ext. P10 is attacked is that the disciplinary proceedings are unwarranted against a Government officer for alleged irregularities or lapses committed in the discharge of his functions as a quasi-judicial authority. It is submitted that even if misconduct can be spelled out in the discharge of the official duties of the petitioner, an order of suspension contemplating disciplinary proceedings will not have the sanction of law in as much as the

petitioner was functioning as a quasi-judicial authority in the matter of approving the order of assessment passed by the Assistant Commissioner of Commercial Taxes. Reliance is sought to be placed on the judgment of the Apex Court in *Zunjarrao Bhikaji Nagarkar* {(1999) 7 SCC 409} where the Apex Court expressed the view that disciplinary action could be taken against an officer discharging judicial functions only when there was an element of culpability involved. But the fact is that the above decision is no more good law in the light of the decision of the Apex Court in *Union of India v. Dulichand* {2006 (3) KLT 939}. Nagarkar's case (supra) was held to be contrary to the view expressed in *Union of India v. K.K. Dhawan* {(1993) 2 SCC 56} and accordingly Nagarkar's case stands overruled by the decision in Dulichand's case (supra). The Apex Court re-affirmed the principles laid down in Dhawan's case in which six instances were listed as relevant materials enabling the disciplinary authority to take action against officers who exercised judicial or quasi-judicial powers. The Apex Court has held that

disciplinary action can be taken against officers who exercise judicial or quasi-judicial powers acting negligently or recklessly. The six instances listed in Dhawan's case are the following:

> **"28.(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;**
>
> **(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;**
>
> **(iii) if he has acted in a manner which is unbecoming of a government servant;**
>
> **(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;**
>
> **(v) if he had acted in order to unduly favour a party;**
>
> **(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago 'though the bribe may be small, yet the fault is great."**

It is pertinent to note that an officer who acts in a manner as would reflect on his reputation for integrity or good faith or devotion to duty, an officer against whom prima facie material is available to show

recklessness or misconduct in the discharge of his duty, officers who act in a manner unbecoming of a government servant, officers who act negligently, those who unduly favour a party, etc. will be liable to face disciplinary action. In the light of the law laid down by the Apex Court as stated above, the protection sought for by the petitioner on the ground of exercise of quasi-judicial power is no more available. Moreover, the misconduct alleged to have been committed by the petitioner does not, in my view, is not a function relatable to the exercise of quasi-judicial power. The order approving the proceedings of the assessing authority is not a quasi-judicial function. Therefore, the case of the petitioner does not require a special treatment when compared to that of other government employees, on the ground that she was exercising a quasi-judicial function. I have, therefore, no hesitation to reject the contention urged on behalf of the petitioner on the ground of quasi-judicial exercise of power.

14. It is contended that the allegations made

against the petitioner as per Ext. P10 will not constitute misconduct because none of the acts referred to therein has factual foundation. Ext. P10 says that the petitioner while approving the assessment order in question did not pay due regard to the pertinent aspect specifically mentioned in the judgment of the Division Bench of this Court in M.F.A. No. 1000 of 2002 to the following effect:

> **"The observations and findings made above shall no way affect the assessment proceedingss and such proceedings shall be concluded based on materials available on record untrammelled by the above observations."**

According to the 1st respondent the above observations made by this Court cannot be lost sight of by the assessing authority or by the petitioner who approved the assessment accepting the return filed by the dealer and that too without carefully examining the materials available on record. In raising such a contention what is meant by the respondent is that the materials which were collected during the inspection and investigation by the Intelligence Wing of the department ought to

have been referred to, discussed properly and due importance in accordance with law should have been given by the assessing authority and the approving authority. According to the respondents, what the assessing authority has done is to place much reliance on the observations made by the Division Bench of this Court in the judgment in M.F.A. No. 1000 of 2002 despite the caution given to the assessing authority by this Court in the very same judgment that the assessment proceedings shall be concluded based on the materials available on record untrammelled by the observations made by this Court while setting aside the penalty proceedings under Section 45A of the K.G.S.T. Act. I have referred to the nature of the order passed by the assessing authority in the previous paragraphs. It is clear from the assessment order that the observations contained in the judgment in M.F.A. No. 1000 of 2002 find detailed narration in the assessment order. The contention of the respondents that more importance was given by the Assessing Authority to the contentions urged by the dealer as also the

observations contained in the judgment in M.F.A. No. 1000 of 2002 and lesser importance, if not no importance at all, was given to the materials gathered by the Intelligence Wing etc. which were available on record, cannot be brushed aside, at least prima facie, as unfounded contentions. Hence, the argument that the statements made in paragraphs 2 and 3 of Ext. P10 have no basis at all, is difficult to be accepted.

15. The next contention is that there was no culpable delay on the part of the assessing authority and the approving authority in completing the assessment. That being the position, the misconduct alleged in paragraph 5 of Ext. P10 is also baseless, contends the learned senior counsel. According to the petitioner, there was justification for waiting for some time in the light of the order of stay passed by this Court in M.F.A. No. 1000 of 2002. In other words, but for the stay order, assessment would have been completed within a reasonable time. In order to appreciate the tenability of the above submission made on behalf of the petitioner, I have verified the stay

order passed by the Division Bench in C.M.P. No. 6124/02 in M.F.A. No. 1000 of 2002. The stay order passed on 16-12-2002 reads:

> **"Petition praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to stay further proceedings pursuant to Annexure F order of the Commissioner of Commercial Taxes till the disposal of this appeal.**
>
> **This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof, and upon hearing the arguments of Mr. P.K. Ravindranatha Menon, Senior Advocate for the petitioner and of the Government Pleader for the respondent, the court passed the following:**
>
> **ORDER**
>
> **Interim stay for one month."**

On 17-1-2003 the above order was extended until further orders.

16. The stand taken by the respondents is that the order of stay was confined to the penalty proceedings impugned in the Miscellaneous First Appeal and the same will not afford justification for delaying the assessment. The above stand cannot be rejected as baseless or untenable. Order of penalty and order of assessment are independent proceedings. Stay of the

proceedings under Section 45A of the K.G.S.T. Act, in the normal course, will not stand in the way of assessment proceedings under Section 17 of the Act. Hence, prima facie, the Government appears to be justified in raising an allegation against the petitioner that the assessment proceedings were unduly delayed under the cover of the stay order. Of course, the petitioner has set up certain defences against the above allegation. One of the defences that is brought to the forefront is that the petitioner had passed timely orders under Section 17(7) of the K.G.S.T. Act so as to keep the assessment proceedings alive, and but for that, the assessment proceedings would have become illegal on the ground of limitation. I think, it is not necessary for this Court, to say anything about the acceptability or otherwise of the above defence at this stage, because whatever findings or observations I make here are based on prima facie impressions and shall not prejudice either of the parties, in the disciplinary proceedings, if at all any such disciplinary proceedings are warranted.

17. The third serious allegation against the petitioner is that the nature of the order passed by the assessing authority accepting the return filed by the dealer thereby resulting in the dealer getting the benefit of Rs.86 lakhs shows clear collusion of the officers with the dealer. Learned senior counsel for the petitioner contended that since the assessing authority passed the best judgment assessment based on materials, and the petitioner has approved the same on being satisfied that the order of assessment is valid and legal, the allegation that there was collusion between the officers and the dealer is not sustainable. In my view, it may not be proper for this Court to go into the merit of the above contention for the purpose of examining whether Ext. P10 order is sustainable or not. The first respondent has entertained the impression based on the materials available on record that the State has lost legitimate revenue with corresponding gain to the dealer and there is room for entertaining the suspicion that there was collusion between the officers and the dealer. This allegation

may or may not be true. That is a matter to be established in the disciplinary proceedings based on evidence and reliable materials. It will be too early for this Court to enter a finding that there was collusion or there was no collusion.

18. In *U.P. Rajya Krishi Utpadan Mandi Parishad v. Sanjiv Rajan* {1993 Supp. (3) SCC 483} the Apex Court, while examining the legality and validity of the order of suspension challenged by the delinquent employee, held as follows:

> **"Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no conclusion can be arrived at without examining the entire record in question and hence it is always advisable to allow disciplinary proceedings to continue unhindered."**

19. In this context yet another argument advanced by the learned senior counsel also requires mention. The argument was that the observations contained in Ext. P10 that the alleged irregular acts of the petitioner were prejudicial to the revenue is not sustainable since neither the assessment order nor the

order approving the assessment will warrant any such inference to be drawn. In order to buttress the above submission, learned counsel placed for my consideration the decision of this Court in *S. Unnikrishnan v. State of Kerala* {(2000) 120 STC 530} as also the decision in *Bismillah Trading Co. v. Intelligence Officer* {(2000) 119 STC 558}. In my view, any finding by this Court touching the above legal proposition is likely to affect the interest of the dealer as also that of the higher authorities under the K.G.S.T. Act. This is a case where the disciplinary authority has not framed any charges against the petitioner. As rightly contended by the Senior Govt. Pleader, there is a distinction between the prima facie materials and allegations which may find place in an order of suspension and the specific charges with statement of allegations in a charge memo under Rule 15 or 16 of the Kerala Civil Services (Classification, Control and Appeal) Rules. At the time of passing the order of suspension it is not a legal requirement that the disciplinary authority should have in its possession

all the materials necessary to prove the allegations. If the materials already on record show that the allegations are grave and that the suspension of the delinquent employee will be necessary in public interest, the authority which passes the order of suspension can be said to be exercising the power conferred on it under Rule 10 of K.C.S. (C.C.&A) Rules, legitimately. I find merit in the contention of the learned Senior Govt. Pleader that this Court may not record any definite opinion regarding the sustainability of the charges that may or may not be framed against the petitioner based on the materials to be collected including those referred to in Ext. P10, because any such opinion will prejudice either of the parties. Such a detailed in-depth examination of the materials is not required or called for, at this stage. I therefore make it clear that whatever observations I have made while discussing the contentions urged by the parties, are based on the prima facie impression and solely for the purpose of examining the validity of the order of suspension and shall not be made use of at the

time of any further action against the petitioner.

20. The petitioner has alleged that Ext. P10 was passed malafide. According to the petitioner, it is the 4th respondent who is the villain of the piece. The above allegation is made on the ground that the 4th respondent was not the officer authorised in the normal course to submit any report relating to the alleged acts of delinquency on the part of the assessing authority and the petitioner. It is also alleged that the 4th respondent is in the habit of raising allegations against senior officers so as to mar their promotional prospects. Another statement made by the petitioner in support of the plea of malafides is that two officers against whom action was taken based on the report filed by the petitioner are in a position to exert influence on the authorities since they belong to service organisations that owe allegiance to the ruling party.

21. I find that the allegations made to substantiate the plea of malafides are so vague and imaginary, that no reliance can be placed on the above

statements. The counter affidavit says that the 4th respondent was directed to conduct inspection and to file a report. It cannot be said that he has not competent to do so. It is for the superior authorities to decide who should be entrusted with specified kinds of duties. The allegation that two officers against whom action was taken based on the report of the petitioner are having access to the superior officers is also without any basis. It is on record that those two officers have been placed under suspension. If the said officers are so influential, it is difficult to appreciate why they could not avoid orders of suspension against them.

22. I am, therefore, of the view that Ext. P10 does not call for interference in exercise of the power of judicial review under Article 226 of the Constitution of India. The writ petition fails and is therefore dismissed.

K.K. DENESAN
JUDGE

jan/